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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

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Office of the Secretary

43 CFR Parts 4, 30

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Updates to American Indian Probate Regulations

AGENCY: Bureau of Indian Affairs, Office of the Secretary, Interior.

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: The Department of the Interior (Department) is considering potential updates to regulations governing probate of property that the United States holds in trust or restricted status for American Indians. Since the regulations were revised in 2008, the Department identified opportunities for improving the probate process. The Department is seeking Tribal input and public comment on its ideas for improvements in the regulations in general, and on the potential regulatory changes identified below in particular.

DATES: Submit written comments by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any one of the following methods:

- Federal rulemaking portal www.regulations.gov. The rule is listed under Agency Docket Number DOI-2019-0001.
- Email: consultation@bia.gov
- Mail, Hand Delivery, or Courier: Ms. Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Department of the Interior, 1849 C Street, NW., Mail Stop 4660, Washington, DC 20240.

We cannot ensure that comments received after the close of the comment period (see DATES) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed above will not be included in the docket for this rulemaking.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Elizabeth K. Appel, Director, Office of Regulatory Affairs & Collaborative Action – Indian Affairs, Elizabeth.appel@bia.gov, (202) 273-4680.

SUPPLEMENTARY INFORMATION:

Background

The Department probates thousands of estates each year for American Indian individuals who own trust or restricted property. The Bureau of Indian Affairs (BIA), the

Office of Hearings and Appeals (OHA), and the Office of the Special Trustee for American Indians (OST) each play a role in the probate process. BIA compiles the information necessary to build a case record (i.e., the probate file) and then transfers the record to OHA for a judge to hold a hearing and issue a final probate decision. In accordance with the judge's final probate decision, BIA distributes the trust or restricted real property ("land") and OST distributes the trust personalty ("trust funds") from the estate.

After the American Indian Probate Reform Act (AIPRA) was enacted in 2004, the Department codified regulations implementing it at 43 CFR part 30 for the OHA adjudication process and at 25 CFR part 15 for the BIA and OST portions of the probate process. In an effort to streamline the process and benefit Indian heirs and devisees, the Department is in the process of identifying where improvements can be made through regulatory change.

Identified Issues and Potential Regulatory Changes

The Department has identified parts of the current regulations that are unclear and/or create uncertainty and recognizes that such problems can lengthen the time it takes to process probates. The Department is considering potential approaches to changing these parts of the regulations and welcomes Tribal input, comment from individuals who hold trust or restricted property, and comment from the general public. The issues and potential approaches to improving the probate process are listed below, in no particular order.

Issue 1: Gaps in AIPRA intestacy distribution.

AIPRA sets out how a decedent's estate should be distributed when the decedent dies without a will (i.e., intestate) at 25 U.S.C. 2206(a). AIPRA addresses how the judge should distribute an estate to any surviving spouse, individual heirs, and/or Tribal heirs, but fails to account for distribution of trust funds under two circumstances when there are no eligible familial heirs under AIPRA: (1) the estate contains trust personalty but no trust real property; and (2) more than one Tribe has jurisdiction over trust real property in the estate. The current 43 CFR 30.254 implements AIPRA and the pre-AIPRA Federal statute for how a judge will distribute the trust real property of a person who dies without a will (i.e., intestate) and has no heirs.

a. Distribution of trust personalty when there are no AIPRA heirs.

AIPRA's intestacy scheme at 25 U.S.C. 2206(a)(2) is limited explicitly by the presumption that a decedent's estate contains interests in trust or restricted land, such that the distribution of a decedent's trust personalty will follow the distribution of the trust land interests. AIPRA provides that if there are no other heirs, the interests will pass to the Tribe with jurisdiction over the trust land interests. *See* 25 U.S.C. 2206(a)(2)(B)(v). The current regulation at § 30.254 incorporates the statutory provision at § 2206(a)(2) but does not identify trust personalty as a stand-alone category of trust property for distribution. In practice, this creates instances where AIPRA's intestacy scheme fails to resolve how trust personalty will be distributed. Those instances occur when there are no eligible person heirs and the decedent has no land interests where a Tribe could have jurisdiction and be considered the "heir." OHA judges have declined to distribute a decedent's trust personalty estate if it is the only trust estate asset and there are no eligible

person heirs. Instead, OHA judges dismiss these estates on the basis that a statutory or regulatory change is required to provide authority for distribution of the trust personalty.

b. Distribution of trust personalty when more than one Tribe has jurisdiction.

As mentioned above, AIPRA provides that if there are no other heirs, the interests will pass to the Tribe with jurisdiction over the trust land interests. *See* 25 U.S.C.

2206(a)(2)(B)(v). Neither AIPRA nor the implementing regulations specify which Tribe will receive the trust personalty if more than one Tribe has jurisdiction over trust land interests in the estate.

- *Potential Regulatory Change:* To address these gaps in AIPRA’s default intestacy scheme, the Department is considering revising 43 CFR 30.254 and adding additional sections. Specifically, the Department is considering having these additional sections provide clear authority for an OHA judge to order distribution of trust funds when there are either no land interests in a decedent’s estate or there are land interests within the jurisdiction of more than one Tribe. The rule under consideration identifies potential recipients of the trust personalty: close relatives who do not inherit under AIPRA as “eligible heirs,” followed by nieces and nephews, and then by the Tribe where the decedent was enrolled. If a decedent does not have close relatives, nieces or nephews, and was not enrolled in any Tribe, then the potential recipients would include the Tribe(s) in which the decedent’s parents or grandparents were enrolled. If the decedent was not enrolled in any Tribe, and none of the decedent’s parents or grandparents were enrolled in any Tribe, then the judge would exercise discretion by determining the Tribe with whom decedent was

most closely affiliated. Such a determination could take into account the Tribal enrollment or affiliation of a decedent's ancestors from whom he or she inherited trust or restricted real property or trust personalty.

Issue 2: Overly burdensome “purchase at probate” process.

AIPRA authorizes certain “eligible purchasers” to purchase trust and restricted interests in a parcel of land in the decedent's estate under certain circumstances. *See* 25 U.S.C. 2206(o). The regulations set out this “purchase at probate” process at 43 CFR subpart G. *See* §§ 30.160 through 30.175. A number of issues have arisen in implementing these regulations.

- a. The current regulations establishing the purchase at probate process are not in chronological order.
 - *Potential Regulatory Change:* Rewrite subpart G of the regulations to list the purchase at probate steps in chronological order.
- b. Currently if someone seeks to purchase interests in one tract that is included in an estate, the purchase at probate process proceeds for the interests in that tract but the entire estate is kept open in the meantime.
 - *Potential Regulatory Change:* Allow for final distribution of all parts of an estate not subject to purchase at probate while the purchase at probate process takes place.
- c. The current regulations require the purchase at probate to occur before OHA issues its final decision. This forces OHA to make provisional determinations of heirs or devisees, which opens the possibility of having to redo the already-lengthy purchase at probate process in situations such as will contests or

objections regarding determinations of heirs that are made when the final decision is issued. The problems of completing the purchase at probate process before the heirs/devisees are determined is intensified in situations in which the purchase may only be approved if the heirs/devisees consent. If the preliminary determination of heirs/devisees is incorrect, the wrong individuals have consented or refused to consent.

- *Potential Regulatory Change:* Allow OHA to issue the final decision to determine the heirs/devisees before beginning the purchase at probate process.
- d. The current regulations do not include a provision to seek initial consent from heirs/devisees as to their willingness to consider bids to purchase property interests. Instances occur in which heirs/devisees do not indicate intent to participate in the purchase at probate process. When initial consent is not included, the purchase at probate process may progress for a long time before the heir/devisee's consent is sought, thus resulting in process delays.
- *Potential Regulatory Change:* For purchases in which consent is required, add provisions stating that OHA will issue an initial order to heirs/devisees to provide written notification of their willingness to consider bids that may be made by potential purchasers, and that if written notification is not received by a deadline, OHA may presume the heirs/devisees do not consent to the purchase of the property interest(s) and may deny the request to purchase.
- e. When OHA receives a request to purchase at probate, the current regulations require OHA to notify all "eligible purchasers." "Eligible purchasers" include persons who own undivided trust or restricted interests in the same parcel of

land involved in the probate proceeding, i.e., co-owners. For co-owners who have not submitted a purchase request, OHA provides notice by posting in multiple places. This posting adds significant time to the process, while resulting in few, if any, co-owner requests to purchase. AIPRA does not require notice in such a scenario.

- *Potential Regulatory Change:* Revise the regulations to require co-owner notice only to co-owners who have submitted prior notice to the BIA that they want to receive notice of probates involving specified allotments, and to establish that such notice will be made by mailing rather than posting. These potential changes would work to reserve notice to co-owners only for situations in which a co-owner has requested to receive notice, while continuing to meet due process requirements and reducing complexities in the probate process.
- f. AIPRA prohibits approval of a purchase at probate interest for less than fair market value, and the current probate regulations state that market value will be determined by an appraisal or valuation method developed by the Secretary. At this time the Department is able to provide the fair market value of a real property interest only via an appraisal. The Department is unable to perform appraisals for minerals-only interests.
- *Potential Regulatory Change:* Revise the purchase at probate regulations to clarify that no minerals-only property may be purchased at probate and to accurately reflect the Department's current appraisal practice.

Issue 3: Notice to co-owners who are “potential heirs.”

Under AIPRA’s intestate distribution scheme, co-owners of allotments are potential heirs in some circumstances. For example, if a decedent dies without any eligible person heirs as listed in AIPRA’s order of succession, and there is no Tribe with jurisdiction over the allotment, a surviving co-owner of a trust or restricted interest in the allotment can potentially be an “heir” of last resort. Allotments often have many co-owners; some have over one thousand, for example. The current regulations require OHA to provide all interested parties—including co-owners—with mailed notice of probate proceedings. Mailing notice to all co-owners who are potential heirs in a probate case makes the process unnecessarily complex.

- *Potential Regulatory Change:* Modify the regulations to state that potential heirs who may inherit solely based on their status as co-owners will not receive mailed notice of a probate proceeding, unless they have previously filed a request for notice with BIA or OHA. Public notice will continue to be posted.

Issue 4: Insufficient trust funds for funeral services.

The current regulations allow whoever is responsible for making the funeral arrangements on behalf of the decedent’s family to obtain up to \$1,000 from the decedent’s Individual Indian Money (IIM) account to pay for funeral services. (*See* 25 CFR 15.301). This amount has repeatedly proven to be insufficient. The current regulations further require there to be at least \$2,500 in the decedent’s IIM account at the date of death in order to request the \$1,000 distribution.

- *Potential Regulatory Change:* Allow individuals to request up to \$5,000 from the decedent’s IIM account to pay for funeral services and eliminate the requirement for a certain amount of trust funds to be in the IIM account as of

the date of death. This change recognizes the increase in the costs of funeral services and would ensure that family members are able to pay such costs immediately.

Issue 5: No current regulatory process for exercise of “tribal purchase” option.

Aside from the “purchase at probate” provisions discussed above, AIPRA also authorizes a Tribe with jurisdiction to purchase an interest in trust or restricted land, if the owner of that interest devises it to a non-Indian. *See* 25 U.S.C. 2205(c)(1)(A). No current regulations implement this statutory Tribal purchase option. Cases in which the Tribal purchase option is available could be processed more efficiently if there are provisions addressing such topics as notice procedures to a Tribe and other interested parties, timeframes that a Tribe must meet to exercise the option, and the process by which fair market value will be determined. Regulations would also ensure uniformity of process from one case to the next.

- *Potential Regulatory Change:* Add new regulations to implement the 25 U.S.C. 2205(c)(1)(A) Tribal purchase option in an efficient and uniform manner.

Issue 6: Cumbersome process for minor estate inventory corrections.

In the course of its probate work, BIA sometimes determines after a probate decision has been issued that trust or restricted property belonging to a decedent was either omitted from or incorrectly included in the inventory of an estate. Such circumstances require an inventory correction, so that the probate decision can be applied to the property interest in question. The current regulations, at 43 CFR 30.126, require OHA to issue a modification order for these inventory corrections to occur. The regulations also

require that the modification order be appealable to the Interior Board of Indian Appeals (IBIA). As a result, it can take significant time to make minor estate inventory corrections to include omitted property.

- *Potential Regulatory Change:* Revise the probate regulations to improve probate process efficiency and reduce the amount of time for estate inventory corrections to be made. Potential revisions could be to authorize BIA to make minor estate inventory corrections or to streamline the process that OHA follows before issuing an inventory modification order. One such streamlining measure could involve an heir or devisee being allowed to—prior to the exercise of an IBIA appeal option—request that an OHA judge reconsider a modification order, thus reducing the number of cases that might result in such an IBIA appeal.

Issue 7: Unclear judicial authority to access necessary information.

In probate cases involving a challenge to a will—such as on the basis of testamentary capacity or one’s ability to make a valid will—the presiding OHA judge may need to order medical records. Under the current regulations, it is unclear what authority an OHA judge has to order such information. Likewise, it is unclear under the current regulations what authority a judge has to issue interrogatories in cases involving will contests. (*See* 25 CFR 15.204 and 43 CFR 30.114). Recipients of such orders and information requests sometimes challenge OHA’s authority and may even refuse to provide information necessary for a probate decision to be made. This adds the time necessary to complete the probate process and may result in a final probate decision based on a minimally sufficient record.

- *Potential Regulatory Change:* Add provisions explicitly allowing the OHA judge to order medical records and vital records from State and local entities as needed, and to issue interrogatories in cases involving will contests.

Issue 8: Indian status determinations not necessary in every case.

Under current probate regulations, a final probate decision must determine the Indian status of every heir or devisee. A determination of Indian status is often not necessary and applying the definition of “Indian” can be complicated.

- *Potential Regulatory Change:* Require probate decisions to determine the Indian status of an heir or devisee only when such a determination is necessary; for example, the determination of Indian status may be necessary in AIPRA cases involving a will and where the devisee is not a lineal descendant of the decedent.

Issue 9: Increase the scope of opportunities to use “renunciation” as a means for maintaining property being held in trust.

The current regulations allow an heir or devisee to renounce an inherited or devised interest in trust or restricted property. (*See* 43 CFR pt. 43 supt. H). A renunciation must take place before a probate decision is made. Once a probate decision is made, renunciation is not allowed. The current regulations allow petitions for rehearing to be filed within 30 days of a probate decision being made but fail to list renunciation among the bases for which an OHA judge may grant a rehearing.

- *Potential Regulatory Change:* Revise the regulations to allow for renunciation at the rehearing stage, so that the renunciation option can be exercised to prevent property from going out of trust even if renunciation was not sought before an initial probate decision was made.

Issue 10: Make more relevant the presumption-of-death rule.

The probate process obligates OHA—in some circumstances—to determine whether a person is deceased. Proof of death is not always available. To facilitate the decision-making process, the current regulations allow OHA make a presumption of death. The current rule is that such a presumption may be made if there has been no contact with the absent person for the last six years, dating back from the time of the *hearing*. The hearing does not always occur until well after a probate file is sent by BIA to OHA.

- *Potential Regulatory Change:* Revise the presumption-of-death provisions in 43 CFR 30.124(b)(2), keeping the six-year rule but having it date back to the last date of known contact with the absent person. As needed for practicality, these revisions could include exceptions and/or rules about what “known contact” entails and/or how “known contact” is shown.

Issue 11: The requirements for filing petitions for rehearing and reopening need clarification.

In separate areas of the current regulations, a party may file a petition for rehearing or a petition for reopening (*see* 43 CFR 30.240 and 30.125). A petition for rehearing must be filed within 30 days of the probate decision and the requirements for presenting new evidence are very specifically laid out. Petitions for reopening may be filed much later by someone who had the chance to participate in the initial probate proceeding but did not do so. Time spent processing a reopening request reduces the time available for other probate cases.

- *Potential Regulatory Change:* Revise the current regulations to: 1) limit the ability of a party who did not use the opportunity to participate in an initial

probate proceeding to later file a petition for reopening; and 2) in a rehearing and reopening proceedings, make clear the circumstances under which new evidence may be presented.

Issue 12: Even small, simple estates must undergo a probate proceeding.

Heirs and devisees often express frustration at how long it takes the Department to process a decedent's estate. One reason that probate takes time is that the current regulations require cases with any amount of trust funds to be adjudicated by an OHA decision maker.

- *Potential Regulatory Changes:* Increase the scope of estates that are subject to OHA's summary process, which does not require a formal hearing (*see* 43 CFR part 30 subpart I), and/or determine what would be considered a small estate and, for estates within that definition, create a streamlined distribution scheme for such estates.

Issue 13: Current regulations fail to address implementation of the AIPRA provision regarding descent of off-reservation lands.

AIPRA distinctly addresses the descent of interests in trust or restricted lands that are located outside the boundaries of an Indian reservation and are not subject to the jurisdiction of a Tribe. *See* 25 U.S.C. 2206(d)(2). The current regulations fail to address implementation of this statutory provision, however, which may be applied inconsistently or not at all.

- *Potential Regulatory Changes:* Address implementation of an AIPRA provision (25 U.S.C.2206(d)(2)) concerning off-reservation lands. The purpose of such a

change would be to ensure consistency and transparency in OHA decisions, and to increase the public's awareness about exceptions to the AIPRA rules that exist.

Authority

The Department is issuing this ANPRM under the authority of 5 U.S.C. 301, 25 U.S.C. 2, 9, 372, 373 and the Indian Land Consolidation Act of 2000 (ILCA) as amended by the American Indian Probate Reform Act of 2004 (AIPRA), 25 U.S.C. 2201 et seq.

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Assistant Secretary - Policy, Management and Budget

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